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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 836

W.M.C.A. INC.; R. PETER STRAUS; JOSEPH DE MAIO; EDWARD LIND; S. THOMAS DELANEY; EDWARD C. BROWN; JAMES J. McCAFFERTY,

Appellants,

against

CAROLINE K. SIMON, Secretary of State of the State of New York; LOUIS J. LEFKOWITZ, Attorney General of the State of New York; ABE STARK, President of the City Council of the City of New York; A. HOLLY PATTERSON, Chairman, Board of Supervisors, Nassau County; OWEN M. QUINN, Chairman, Board of Supervisors, Westchester County; WILLIAM J. LEONARD, Chairman, Board of Supervisors, Suffolk County; DENIS J. MAHON, JAMES POWER, JOHN R. CREWS, THOMAS MALLEE, Commissioners, Board of Elections New York City,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF ABE STARK, DENIS J. MAHON, JAMES POWER, JOHN R. CREWS AND THOMAS MALLEE, APPELLEES

April 27, 1962

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Plaintiffs below have appealed pursuant to 28 U.S.C. 1253, from a judgment of a three-judge District Court dismissing their complaint. The relief sought by plaintiffs was (1) a declaratory judgment that the constitutional and statutory provisions relating to the apportionment of New York Senate and Assembly districts (Constitution, Art. III, Secs. 2-5; State Law, Secs. 121, 123) violate the Fourteenth Amendment of the United States Constitution, and (2) a permanent injunction restraining the defendants from performing their official duties under the challenged enactments.

This brief is submitted by appellee Abe Stark, President of the Council of the City of New York and appellees

Denis J. Mahon, James Power, John R. Crews and Thomas Mallee, Commissioners of the Board of Elections of the City of New York, in support of the appellants' position that this Court has jurisdiction of the appeal.[1]

Statement

Appellees will not repeat the introductory portions of the Jurisdictional Statement filed by the appellants (pp. 2-5). They deem the matters set forth there to be a fair and accurate summary of the jurisdictional facts, the question presented and the allegations of the complaint.

After service of the summons and complaint these appellees filed an answer admitting the allegations of the complaint and asking that the relief prayed for in the complaint be granted (R. 41-42). The other appellees moved for judgment dismissing the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure on the grounds (1) that the court lacked jurisdiction over the subject matter and (2) that the complaint did not state a claim upon which relief could be granted (R. 33-40, 173-178, 306-308).

The motions to dismiss were granted by the statutory court, composed of Circuit Judge STERRY WATERMAN, Chief District Judge SYLVESTER RYAN and District Judge RICHARD H. LEVET.

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[1] Precedent for these appellees' position on this appeal may be found in *MacDougall* v. *Green*, 335 U. S. 281 (1948), where Governor Dwight H. Green of Illinois, a defendant in the action and appellee in this Court, argued in support of the appellants' contention that the election statute there involved violated the Fourteenth Amendment. For an outline of Governor Green's argument see the report of the case in 93 L. ed. 5-6.

The Opinions Below

(1)

Judge LEVET, whose opinion was the longest and may therefore be considered the principal of the three opinions rendered, rejected the movants' contention that the court did not have jurisdiction of the subject matter of the complaint (Jurisdictional Statement, Appendix A, pp. 5a-14a). He held, however, that the complaint fails to state a claim upon which relief can be granted (*ibid.*, p. 24a). He based this conclusion on the holding that the only restrictions on a state's legislative powers over the voting rights of its citizens are those stated in the Fifteenth and Nineteenth Amendments (*ibid.*, p. 19a). He also cited, as additional ground for dismissal, want of equity or of justiciability, based upon the fact that the malapportionment complained of is accomplished by statutory implementation of state constitutional provisions, as distinguished from a statutory malapportionment enacted in contravention of a state constitution (*ibid.*, p. 25a).

Judge WATERMAN, in a short concurring opinion (*ibid.*, pp. 26a-27a), held that the complaint should be dismissed "without reaching the merits" because the issues proffered by the complaint "are not meet for judicial determination", citing *Colegrove* v. *Green*, 328 U. S. 549 (1946).

Judge RYAN, also concurring, agreed with Judge LEVET that the Court had jurisdiction of the cause, which, he added, "should be exercised only in the most compelling circumstances." In his opinion compelling circumstances were confined to discrimination against a particular racial or religious group "in violation of the 15th Amendment or of any other specific injunction of the Constitution" and did not include "mere territorial discrimination" (Jurisdictional Statement, Appendix, pp. 27a-28a).

(2)

Judge LEVET prefaced his discussion of the sufficiency of the complaint with a compilation of the facts deemed admitted (*ibid.*, p. 14a), supplemented by "certain additional facts" of which he took judicial notice (*ibid.*, pp. 15a-16a). Among the latter, one purported fact is so tainted by a latent fallacy as to deprive it of any probative value.

The "fact" referred to is numbered 4 and reads as follows (*ibid.*, p. 16a):

> "New York City with a population of 7,781,984 or 46.0% of the state's population of 16,782,304, has 65 assemblymen or 43.3% of the total assembly, and 25 senators or 43.1% of the total number of senators, while the counties other than those in New York City, with 54.0% of the population, have 56.7% of the total assembly and 56.9% of the senate seats."

The fallacy consists in the Court's comparison between the City's present representation in the senate and assembly with the population figures of the City and State according to the 1960 census, whereas the present apportionment of senate and assembly seats was based on the 1950 census.

It is undeniable that, as the complaint alleges (R. 7), the present apportionment was enacted in 1953 (New York Laws of 1953, Chapter 893) following the decennial census of 1950. Nor will it be denied that no reapportionment statute has been enacted based on the 1960 census.

The following figures are taken from the Legislative Manual, New York 1961-1962 (referred to by Judge LEVET at p. 15a) at pages 1030-1031. In 1950 the population of New York State was 14,830,192 and of the five counties comprising the City of New York (Bronx, Kings, New York, Queens and Richmond), 7,891,957.

It is therefore submitted that, insofar as relevant, the fact of which the Court should have taken judicial notice is as follows:

> "New York City with a population of 7,891,957 or 53.2% of the state's population of 14,830,192 has 65 assemblymen or 43.3% of the total assembly and 25 senators or 43.1% of the total number of senators, while the counties other than those in New York City, with 46.8% of the population, have 56.7% of the total assembly and 56.9% of the senate seats."

As the complaint alleges (Par. 15, R.-10-11) and the census figures establish, an apportionment "pursuant to the discriminatory constitutional formula and based on the 1960 census figures would only continue or even aggravate the existing malapportionment."

The Question Presented Is Substantial

In the view of these appellees it is hardly necessary to argue that the decision of this Court in *Baker* v. *Carr*, 369 U. S. 186, 30 L W 4203, decided March 26, 1962, establishes the substantiality of the question presented in this case. In both actions the appellants, citizens and voters in their respective states, invoked the Equal Protection Clause of the Fourteenth Amendment to strike down apportionment laws alleged to result in "debasement"[2] of their votes. Both actions reached this Court at the same point in the litigation—dismissal by the statutory court, before joinder of issue, upon the ground that the complaint failed to state a claim upon which relief could be granted.

Judge WATERMAN's view that the complaint should be dismissed because it raised political questions not meet for

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[2] The word appears in both complaints. (Complaint, *Baker* v. *Carr*, quoted in 30 U. S. Law Week 4203; complaint, Par. 16, R. 11.)

judicial determination, citing *Colegrove* v. *Green*, 328 U. S. 549, was in effect rejected by Mr. Justice BRENNAN, writing for the Court (30 LW 4210):

> "We understand the District Court to have read the cited cases as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question'.
>
> • • • • • •
>
> Appellants' claim that they are being denied equal protection is justiciable and if 'discrimination is sufficiently shown, the right to relief under the equal protection clause is not diminished by the fact that the discrimination relates to political rights.' *Snowden* v. *Hughes*, 321 U. S. 1, 11."

Here the discrimination is sufficiently shown in Pars. 12-18 of the complaint (R. 8-12), which, at this stage of the action, are deemed admitted. *Gomillion* v. *Lightfoot*, 364 U. S. 339, 341 (1960).

Judge LEVET's ruling (with which Judge RYAN agreed) that the only discriminations in the exercise of the electoral franchise of which the courts may take cognizance are those forbidden by the Fifteenth and Nineteenth Amendments has likewise been rejected by this Court in *Baker* v. *Carr*.

In a concurring opinion Mr. Justice DOUGLAS said (30 LW 4220):

> "Race, color, or previous condition of servitude are impermissible standards by reason of the Fifteenth Amendment, and that alone is sufficient to explain *Gomillion* v. *Lightfoot*, 364 U. S. 339. • • •
>
> Sex is another impermissible standard by reason of the Nineteenth Amendment.

> There is a third barrier to a State's freedom in prescribing qualifications of voters and that is the Equal Protection Clause of the Fourteenth Amendment, the provision invoked here, and so the question is, may a State weight the vote of one county or one district more heavily than it weights the vote in another?".

The question posed by Mr. Justice DOUGLAS was answered by this Court (per BRENNAN, J.) as follows (30 L W 4218):

> "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

Judge LEVET wrote that in *Baker* v. *Carr*, then *sub judice*, this Court would decide whether "the Tennessee voters under federal constitutional provisions have a right to federal enforcement of the Tennessee state constitutional apportionment provisions". The instant case, he said, involves "interference with the enforcement of state constitutional provisions" (Jurisdictional Statement, Appendix A, p. 25a).

It is noteworthy that all eight Justices of this Court who participated in deciding *Baker* v. *Carr* were in agreement that whether the state statute under attack violated the Tennessee constitution was of no consequence in determining whether it violated the Fourteenth Amendment.

Justice BRENNAN wrote (fn. 15, 30 L W 4205):

> "It is clear that appellants' federal constitutional claims rest exclusively on alleged violation of the Fourteenth Amendment.

• • • • • •

> Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

In his dissenting opinion (with which Mr. Justice HARLAN concurred), Mr. Justice FRANKFURTER wrote (30 L W 4245):

> "It is settled that whatever federal consequences may derive from a discrimination worked by a state statute must be the same as if the same discrimination were written into the State's fundamental law."

Here the discrimination is alleged to result not only from the statutes (State Law, Secs. 120-123) but also from the provisions of the State Constitution (Art. III, Secs. 2-5), and the complaint seeks a judgment declaring the unconstitutionality of both enactments (R. 15). The fact that in *Baker* v. *Carr* the target of attack was a state statute, while here it is the state constitution and statute, does not detract from the similarity between, if not the identity of, both actions, for each is "a suit which seeks to interpose the Constitution against enforcement of a state policy" and it is of no moment whether "such policy is defined in a state constitution or in an ordinary statute." *Phillips* v. *United States*, 312 U. S. 246, 251 (1941), quoted in *A. F. of L.* v. *Watson*, 327 U. S. 582, 592 (1946).

The prohibitions of the Fourteenth Amendment against state action apply to all state action, whether executive,[3]

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[3] *Sterling* v. *Constantin*, 287 U. S. 378 (1932).

judicial,[4] by legislative enactment,[5] or by Constitutional enactment.[6]

In confirming the jurisdiction and duty of the courts to protect individual voting rights against discriminatory state action regardless of whether in the form of malapportionment or through other action, *Baker* v. *Carr* decided nothing new or novel. As Mr. Justice BRENNAN and the concurring opinions make crystal clear, this duty of enforcing the protections of the Constitution has always been a function of the courts under our system of government and the courts must perform that function.

The District Court failed to perform this function.

In *Scholle* v. *Hare*, No. 22, October, 1961 Term, plaintiffs appealed to this Court from a judgment of the Supreme Court of Michigan (360 Mich. 1, 104 N. W. 2d 63 [1960]), which dismissed a petition that challenged the constitutionality, vis-a-vis the Fourteenth Amendment, of state senatorial reapportionment provisions of the Michigan Constitution. On April 23, 1962 this Court, *upon the jurisdictional statement and appellees' motion to dismiss or affirm*, vacated the judgment of dismissal and remanded the cause to the Michigan courts "for further consideration in the light of *Baker* v. *Carr*, 369 U. S. 186". (30 L W 3332.)

Baker v. *Carr* and *Scholle* v. *Hare* do not merely establish that the Court has jurisdiction of this cause, but, it is submitted, those decisions warrant a summary vacatur of the judgment of dismissal and a remand to the District Court.

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[4] *Shelley* v. *Kraemer*, 334 U. S. 1 (1948).

[5] *Truax* v. *Raich*, 239 U. S. 33 (1915).

[6] *Gibson* v. *Board of Public Instruction*, 272 F. 2d 763 (5th Cir., 1959); *Scholle* v. *Hare*, 30 L W 3332, vacating judgment, 360 Mich. 1, 104 N. W. 2d 63 (1960).

CONCLUSION

Probable jurisdiction should be noted or, in the alternative, the judgment should be vacated and the cause remanded to the District Court for joinder of issue and trial.

April 27, 1962.

Respectfully submitted,

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Appellees

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